IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 31, 2006

CATHERINE EMILE LANTHORN, A MINOR, ET AL. v. SOBIESKI, MESSER & ASSOCIATES, ET AL.

Appeal from the Circuit Court for Washington County
No. 9085 Thomas J. Seeley, Jr., Judge

No. E2005-01850-COA-R3-CV - FILED APRIL 20, 2006

The plaintiff, a minor acting through a representative, filed this legal malpractice action against her[1] former attorneys, alleging that the attorneys were guilty of negligence in their handling of a suit seeking damages for the wrongful death of the plaintiff's father, Craig Wayde Lanthorn. Specifically, she claims that the defendants were negligent in filing the lawsuit outside the period of the applicable statute of limitations. The underlying wrongful death action was dismissed by the trial court because the court determined that the suit was time-barred. In the instant case, the plaintiff filed a motion to recuse, predicated upon the fact that the judge presiding over the trial court – the Honorable Thomas J. Seeley, Jr. – was the same judge who had earlier dismissed the wrongful death case. The trial court denied the motion to recuse. Later, the defendants filed a motion for summary judgment, contending that they had, in fact, filed the wrongful death action in a timely manner. They relied upon a recent decision of the United States Supreme Court. The plaintiff did not file a response to the motion. The trial court granted the defendants' motion. The plaintiff appeals the trial court's denial of her motion to recuse, but does not challenge the propriety of the grant of summary judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

David C. Lee, Knoxville, Tennessee, for the appellant, Catherine Emile Lanthorn, a minor, by her next friend, Alpha Bridger, her guardian.

David T. Black, Maryville, Tennessee, for the appellees, Sobieski, Messer & Associates, Diane M. Messer, and Wanda G. Sobieski.

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[1] While the attorneys were actually hired by the plaintiff's paternal grandmother, Nancy Lanthorn Ellis, they were also representing the interests of the plaintiff for whose benefit, at least in part, the Ellis' lawsuits were pursued.

OPINION

I.

On August 4, 1994, Craig Wayde Lanthorn died while in the custody of the Washington County Sheriff's Department. Four months later, on December 7, 1994, the plaintiff[2] was born. She was later legitimized as Mr. Lanthorn's daughter.

Nancy Lanthorn Ellis – Mr. Lanthorn's mother and the plaintiff's paternal grandmother – filed a civil rights action in federal district court on August 1, 1995. She did so in her individual capacity and also in a representative capacity on behalf of the minor plaintiff. That suit was prepared and filed for Ms. Ellis by the defendant attorneys in the instant case. It named as defendants, Washington County, the City of Johnson City, the Washington County Sheriff, the Johnson City Chief of Police, and three law enforcement officers. The wrongful death suit claimed that Mr. Lanthorn's death resulted from "the wrongful and unconstitutional acts of the defendants." In addition to civil rights violations, the complaint raised several state law claims. On August 4, 1998, the district court dismissed all but one of the defendants in that case. Ms. Ellis and the one remaining defendant[3] sought review of the district court's judgment in the United States Court of Appeals for the Sixth Circuit. The appeal was not successful.[4] On September 10, 1998, Ms. Ellis re-filed her action in the trial court, alleging, *inter alia*, violations of the Tennessee Governmental Tort Liability Act ("the GTLA"), Tenn. Code Ann. § 29-20-101 *et seq.* (2000 & Supp. 2005).

In December, 2000, the trial court, the Honorable Thomas J. Seeley, Jr., presiding, dismissed the wrongful death complaint, determining that Ms. Ellis' GTLA claims were barred by the statute of limitations codified at Tenn. Code Ann. § 29-20-305(b) (2000). The trial court held that Ms. Ellis had filed her action more than one year after the death of Mr. Lanthorn; consequently, the court concluded that the suit was time-barred. With respect to Ms. Ellis' common law claims against the law enforcement officers and Washington County, the court ruled that those claims were barred by the doctrine of *res judicata*, as they had been raised in the district court action and dismissed by that court. The trial court's final order was appealed to this court, but that appeal was later dismissed upon Ms. Ellis' motion.[5]

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[2]When we refer to the plaintiff, we are referring to Catherine Emile Lanthorn.

[3]The district court had held that the one remaining individual defendant was not entitled to immunity. The Sixth Circuit apparently affirmed this holding. The record does not reflect the final disposition of the federal wrongful death action against this individual.

[4]The Sixth Circuit affirmed the district court's judgment. *See* ***Ellis v. Washington County***, 198 F.3d 225 (6th Cir. 1999). On April 24, 2000, the United States Supreme Court denied Ms. Ellis' petition for writ of certiorari.

[5]While the case was pending in the Tennessee Court of Appeals, the defendant attorneys in the instant case filed a motion to withdraw, which motion was granted. Subsequently, Ms. Ellis voluntarily moved to dismiss her appeal. That motion also was granted.

On October 14, 2004, the plaintiff, in her name but acting through a new representative, filed the instant action against the attorneys who had handled the previous federal and state lawsuits filed in Ms. Ellis' name. The plaintiff alleged that the defendant attorneys had committed malpractice by failing to file the state court lawsuit within the period of the applicable one-year statute of limitations. Two months later, the plaintiff filed a motion to recuse Judge Seeley, on the basis that, as Judge Seeley had presided over the underlying wrongful death case, his ability to be impartial could be called into question. Judge Seeley denied the plaintiff's motion, finding as follows:

> This is a legal malpractice or negligence case which is likely to go to trial before a jury. The undersigned was the judge who dismissed the underlying case out of which this malpractice arose. Notwithstanding that, this judge can be impartial and fair to both sides and has no bias for or against either party.

On April 1, 2005, the defendants filed a motion for summary judgment. In essence, the defendants asserted that the filing of the wrongful death action in the trial court on September 10, 1998, was timely. They found support for this assertion in the holding of the United States Supreme Court in the case of ***Jinks v. Richland County, South Carolina***, 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003), which was decided nearly eighteen months prior to the filing of the complaint in the instant action. In ***Jinks***, the Supreme Court reversed a decision of the South Carolina Supreme Court, which state court decision had declared unconstitutional 28 U.S.C. § 1367(d) (1993) "which required the state statute of limitation to be tolled for the period during which [the South Carolina plaintiff's] cause of action had previously been pending in federal court." ***Id***., 538 U.S. at 458, 123 S.Ct. at 1669. In ***Jinks***, as in the instant case, the plaintiff's suit, originally filed in a federal district court, sought damages for her claim pursuant to 42 U.S.C. § 1983, as well as supplemental state law claims for the wrongful death of the plaintiff's husband. ***Id***., 538 U.S. at 460, 123 S.Ct. at 1670. The defendants in ***Jinks*** were granted summary judgment on the § 1983 claim, after which the district court "issued an order declining to exercise jurisdiction over the remaining state-law claims, dismissing them without prejudice pursuant to 28 U.S.C. § 1367(c)(3)." ***Id***. Subsequently, the plaintiff filed suit in a South Carolina state court on the state law claims and secured a verdict for $80,000. ***Id***. On appeal to the South Carolina Supreme Court, that court held the plaintiff's claims were time-barred under South Carolina law. ***Id***. The court concluded that the tolling effect of § 1367(d) as applied to claims brought in a state court constituted an unconstitutional interference with a state's sovereign authority to set the parameters pursuant to which a political subdivision of the state would be subject to suit. ***Id***. On writ of certiorari, the United States Supreme Court reversed the South Carolina Supreme Court, holding that 28 U.S.C. § 1367, as applied to a political subdivision of a state, is not unconstitutional. ***Id***., 538 U.S. at 465-67, 123 S.Ct. at 1672-73.

28 U.S.C. § 1367(d) provides as follows:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under

> subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

In the instant case, the defendant attorneys directed the trial court's attention to the provisions of Tenn. Code Ann. § 28-1-115 (2000):

> Notwithstanding any applicable statute of limitation to the contrary, any party filing an action in a federal court that is subsequently dismissed for lack of jurisdiction shall have one (1) year from the date of such dismissal to timely file such action in an appropriate state court.

Thus, the defendants contended that, because they had filed their state court action some five and one-half weeks following the dismissal of their federal court case, the state court action had been timely filed, thereby negating any claim of malpractice on the basis of a failure to comply with the applicable state one-year statute of limitations. As previously stated, the plaintiff did not file a response to the defendants' motion for summary judgment.

On August 4, 2005, the trial court – effectively reversing itself with respect to its earlier ruling in the wrongful death action – granted the defendants' motion, finding that the ***Jinks*** case "establishes that the Defendants were correct in their interpretation of 28 U.S.C. 1367(d)" and "[t]here was no professional negligence on the part of the Defendants." From this order, the plaintiff appeals.

II.

The plaintiff's sole issue on appeal presents the following question for our review:

> Did the trial court judge abuse his discretion in refusing to recuse himself in the instant case on the basis of his presiding over the underlying wrongful death action?

The plaintiff does not challenge the propriety of the grant of summary judgment.

"[D]ecisions concerning whether recusal is warranted are addressed to the judge's discretion, which will not be reversed on appeal unless a clear abuse appears on the face of the record." ***Davis v. Liberty Mut. Ins. Co.***, 38 S.W.3d 560, 564 (Tenn. 2001) (citing ***State v. Hines***, 919 S.W.2d 573, 578 (Tenn. 1995)). Under the abuse of discretion standard, "[a] trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.' " ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999) (bracketing in ***Eldridge***)).

In determining whether recusal is appropriate, "the mere fact that a judge has ruled adversely to a party or witness in a prior judicial proceeding is not grounds for recusal." ***Davis***, 38 S.W.3d at 565 (citing ***Hines***, 919 S.W.2d at 578). Otherwise, "recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic advantage, which the courts frown upon." ***Davis***, 38 S.W.3d at 565 (citing ***Kinard v. Kinard***, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)).

In the instant case, the plaintiff contends that Judge Seeley's role as the adjudicator of the issues in the underlying case calls his impartiality into question, thereby necessitating his recusal. Furthermore, the plaintiff claims that Judge Seeley "should have known that he likely would be called as a witness in this case."

The plaintiff does not extensively expound upon either of her contentions. As to her first argument, she simply says that Judge Seeley's role – as the judge who dismissed the underlying wrongful death action – necessitates his recusal. We do not understand how Judge Seeley's involvement in the underlying litigation would disqualify him from hearing this legal malpractice action. His dismissal of the wrongful death action did not address, expressly or by implication, whether the dismissal was proximately caused by or even remotely associated with any act of legal malpractice on the part of the defendants in the instant case. Obviously, the issue of legal malpractice was not before the court when Judge Seeley concluded that the wrongful death action was time-barred. Stated another way, the wrongful death suit was, in Judge Seeley's opinion, time-barred without regard to whether Ms. Ellis' lawyers in that case had pursued their representation in keeping with the applicable standard of care or not. On the issue of the alleged appearance of impropriety, we hold that no reasonable person could question Judge Seeley's impartiality in hearing the instant litigation simply because he ruled, as a matter of law, that the underlying suit was filed outside the period of the applicable statute of limitations. As we have previously stated, the fact that a judge has previously ruled against one[6] of the parties now before the judge is not *per se* a ground for recusal. ***Davis***, 38 S.W.3d at 565.

With respect to the issue of whether Judge Seeley should have recused himself because he might be called as a witness, it is clear that a judge presiding over a case cannot be a witness in the same case. *See* Tenn. R. Evid. 605 ("The judge or chancellor presiding at the trial may not testify in that trial"). However, in the instant case, the plaintiff does not tell us why Judge Seeley's testimony would be necessary in this legal malpractice case. Quite frankly, we are at a loss to understand on what issue or issues Judge Seeley might have been called as a witness. He knew absolutely nothing about what these lawyers did or did not do in preparing to file and in filing the underlying case. Everything Judge Seeley knew that had a bearing on the instant case – the filing of the underlying lawsuit, the date it was filed, the history of the federal court litigation, other pleadings in the two lawsuits – is a matter of record and easily proved without Judge Seeley's participation in this proceeding as a witness. Contrary to the plaintiff's contention that Judge Seeley

[6]Actually, the trial court's earlier ruling was adverse not only to the plaintiff, whose interest was then being pursued by Ms. Ellis, but also as to Ms. Ellis' attorneys.

"likely would be called as a witness in this case," we hold that there is no conceivable subject that would require Judge Seeley to trade his seat on the bench for a seat at the witness stand.

Quite simply, there is nothing in this record establishing a basis for recusal. Accordingly, we find no abuse of discretion in the trial court's refusal to step aside.

III.

The defendants raise two additional issues:

> 1. Does the plaintiff's failure to file a substantive response to the motion for summary judgment, and her subsequent failure to challenge the grant of summary judgment on appeal, render any error caused by the trial court's denial of the motion to recuse harmless?
>
> 2. Should this appeal be dismissed pursuant to Tenn. R. App. P. 26(b) for the plaintiff's failure to file a transcript or statement of the evidence?

We have considered these issues, but conclude that they are without merit.

IV.

The judgment of the trial court is affirmed. This case is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, Catherine Emile Lanthorn, a minor, by her next friend, Alpha Bridger, her guardian.

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CHARLES D. SUSANO, JR., JUDGE